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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

12 SILICON VALLEY TELECOM EXCHANGE,  
13 LLC, a California corporation,

14 Plaintiffs,

15 v.

16 VERIO INC., a Delaware corporation; NTT  
17 AMERICA, INC., a Delaware corporation; and  
DOES 1 through 25,

18 Defendants.  
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Case No. 12-CV-00899 HRL

**DEFENDANTS VERIO INC. AND NTT  
AMERICA, INC.'S TRIAL BRIEF**

Date: September 10, 2013  
Time: 1:30pm  
Dept: Courtroom 2, 5<sup>th</sup> Floor  
Judge: Hon. Howard R. Lloyd

Trial Date: September 16, 2013

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## INTRODUCTION

Very little remains to be tried in this case. The Court’s August 13 summary adjudication order disposed of Silicon Valley Telecom Exchange, LLC’s (“SVTX”) claim for holdover rent—the theory on which SVTX pursued this case. And although the Court did not adjudicate SVTX’s claim for lost rent, which was not before it in the motion, as detailed in Verio Inc. (“Verio”) and NTT America’s (“NTTA”) concurrently filed motion *in limine* No. 1, SVTX has no viable basis for claiming lost rent, and its discovery responses show that SVTX abandoned its claim for lost rent long ago. Consequently, the only claim that will remain to be adjudicated at trial will be SVTX’s claim for reimbursement of environmental expenses.

It is unclear what basis for liability SVTX intends to present at trial. SVTX pled in its complaint that it is entitled to lost rent damages for two reasons: Verio and NTTA’s presence at 250 Stockton Ave. in San Jose, California (“250 Stockton”) during remediation, and Verio and NTTA’s failure to obtain an environmental closure letter. But the Court rejected both theories of liability in its summary adjudication order, and neither remains in the case. In opposing summary adjudication, SVTX also claimed for the first time that it was entitled to recover lost rent because Verio and NTTA left generators and related equipment on the property. But SVTX never pled this as a basis for recovering lost rent and, to the contrary, insisted that Verio and NTTA were *required* to leave the equipment on the property when they were on the verge of removing it, and has conclusively admitted that it owns the generators.

Irrespective of which claims are tried, SVTX is not entitled to any damages from Verio or NTTA. Verio and NTTA met all of their lease obligations, and neither Verio nor NTTA harmed SVTX in any way. The contamination at 250 Stockton occurred long before Verio and NTTA moved in. Moreover, the evidence will show that SVTX itself caused the very delays it alleges entitle it to damages. Dismissal with prejudice of SVTX’s frivolous claims, with costs and sanctions awarded to Verio and NTTA, is the only appropriate result in this case.

## STATEMENT OF FACTS

### **I. SVTX INTENTIONALLY AND REPEATEDLY DELAYED VERIO AND NTTA'S EFFORTS TO VACATE 250 STOCKTON**

Verio and NTTA elected to terminate their leases because of SVTX's persistent mismanagement of 250 Stockton. Verio and NTTA wasted no time informing SVTX that they were terminating their leases. But after being informed that Verio and NTTA were leaving, SVTX did not respond. Instead, it dragged its feet for months. SVTX greatly delayed Verio and NTTA's efforts to remediate the property, by insisting that Verio and NTTA leave the generator equipment on the property, which exponentially increased the complexity of the remediation, and by requiring Verio and NTTA to remediate the property to a standard not required by any governmental agency. This was all part of SVTX's response to technology change and a collapsing real estate market—it wanted to keep the equipment in place to help attract new tenants, but the equipment and building were too old and outdated to be of interest to any new tenant. SVTX's only financial hope was to try to force Verio and NTTA to continue to pay rent even after the leases were terminated.

#### **A. Verio and NTTA Terminated Their Leases Because of SVTX's Persistent Failure to Properly Manage 250 Stockton Jeopardized Their Operations**

Verio and NTTA entered into their Lease Agreements with SVTX to operate data centers at 250 Stockton. Among other things, the Lease Agreements required SVTX to provide electricity and security—two of the most critical things required for a data center—so that Verio and NTTA could run their facilities. SVTX consistently failed to meet its lease obligations, culminating in a notice that Verio sent SVTX in December 2001 that listed more than a dozen independent grounds for default. In 2002, Verio chose to vacate 250 Stockton, electing to pay rent on vacant space *for eight-and-a-half years* rather than put up with SVTX's ongoing failure to deliver a minimum level of service. Although NTTA stayed longer, it too ceased operations at 250 Stockton well before the termination of its Lease Agreement. By 2009, both Verio and NTTA were operating their data centers at a different facility near 250 Stockton. SVTX

1 collected millions of dollars of rent from Verio and NTTA for property that for years was used  
2 only by Mr. Rubio's other businesses.

3 **B. After Months of Delay, SVTX Insisted That Verio and NTTA Were**  
4 **Obligated to Return 250 Stockton to Core and Shell, and Approved**  
5 **Verio and NTTA's Decommissioning Plan**

6 SVTX obstructed Verio and NTTA's efforts to vacate 250 Stockton from the moment it  
7 learned that Verio and NTTA would be terminating their leases. In May 2009, Verio and NTTA  
8 asked Mr. Rubio to confirm their end of lease obligations. Between May and September, Verio  
9 and NTTA repeatedly wrote to Mr. Rubio for clarification as to the manner in which SVTX  
10 wanted the property to be turned over at the end of the lease. Verio and NTTA's requests went  
11 unanswered. When Verio and NTTA sent termination letters to Mr. Rubio on July 30, 2009  
12 through certified mail, the letters were returned unopened.

13 SVTX ignored Verio and NTTA's requests for clarification and notice of termination until  
14 September 16, 2009. At that time SVTX insisted that the terms of each party's lease agreement  
15 *required* Verio and NTTA to remove the fuel tank and generators that Verio had installed at  
16 250 Stockton ("the equipment"), and to return the entire site back to core and shell. Wishing to  
17 satisfy SVTX, Verio and NTTA began accepting bids for decommissioning of its equipment to  
18 remove the equipment and return 250 Stockton back to core and shell. On November 3, 2009  
19 Verio and NTTA's contractor CBI, Inc. provided SVTX with a detailed decommissioning plan to  
20 accomplish these goals. The plan would have cost Verio and NTTA nothing, as CBI was willing  
21 to accept the salvage cost of the equipment in exchange for carrying out the decommissioning.  
22 SVTX approved the plan. As soon as SVTX approved the decommissioning plan in November  
23 2009, Verio and NTTA began accepting bids from subcontractors to complete the work. With  
24 contractors and subcontractors in place, decommissioning was set to begin on March 9, 2010.

25 But then SVTX stopped it.  
26  
27  
28

**C. At the Last Minute, SVTX Unilaterally Canceled the Decommissioning Plan and Seized Verio and NTTA's Equipment**

Four months after approving Verio and NTTA's decommissioning plan and just days before decommissioning was set to begin, SVTX abruptly reversed field and insisted it was entitled to Verio and NTTA's equipment and that the equipment could not be removed.

The first sign of SVTX's change of heart came on February 23, 2010, two weeks before Verio and NTTA were about to begin the scheduled removal of equipment at 250 Stockton, when SVTX unexpectedly offered a buyout of Verio and NTTA's lease obligation. This offer, of course, implicitly recognized that the equipment belonged to Verio and NTTA and that SVTX needed to purchase the equipment from Verio and NTTA to acquire it. If Verio and NTTA accepted SVTX's buyout offer, SVTX would take title to the equipment. Verio and NTTA considered the offer and rejected it on March 3. But that did not stop SVTX.

The day after Verio and NTTA's rejection, SVTX responded by simply taking the equipment that, the day before, it recognized belonged to Verio and NTTA. On March 4, 2010—five days before the decommissioning was set to begin—SVTX sent a cease and desist letter ordering Verio and NTTA not to remove the equipment and threatening suit if they failed to comply. Mr. Pinckney, the same counsel who represents SVTX in this lawsuit, sent a second cease and desist letter on March 10. Mr. Pinckney's letter repeated arguments SVTX made in its March 4 letter that the equipment belonged to SVTX and could not be removed from the property. Although SVTX had no basis to seize Verio and NTTA's equipment, Verio and NTTA agreed to comply with SVTX's demands, hoping to avoid the litigation that SVTX threatened.

SVTX's unexpected reversal meant that the decommissioning would not go forward, and that the equipment would remain at 250 Stockton to become a windfall for SVTX. On March 31, Verio and NTTA made a final request to remove the equipment and proceed with the restoration of 250 Stockton. Verio and NTTA offered to abide by the decommissioning plan that SVTX had already approved. Verio and NTTA explained that if SVTX did not accept this offer by April 10, Verio and NTTA would comply with SVTX's cease and desist letters and leave the equipment

1 behind on an “as is” basis. In the end, SVTX did not permit Verio and NTTA to decommission  
2 250 Stockton, and the equipment remained on the property.

3 SVTX never retracted its cease and desist letters, and took ownership of the equipment on  
4 an “as is” basis.

## 5 **II. SVTX DELAYED THE REMEDIATION**

6 Despite not having any evidence of contamination attributable to Verio or NTTA, or any  
7 regulatory reason for remediation to be done, SVTX insisted that Verio and NTTA were required  
8 to clean the soil at 250 Stockton. But instead of facilitating Verio and NTTA’s remediation of the  
9 land adjacent to their leased warehouse space, SVTX prevented Verio and NTTA from removing  
10 the equipment. SVTX’s insistence that the equipment could not be removed greatly complicated  
11 and delayed the remediation. And once remediation began, SVTX caused further delays by  
12 insisting that Verio and NTTA perform remediation to a level not required by any regulation or  
13 agreement.

### 14 **A. SVTX’s Environmental Consultant Testified that Remediation Could** 15 **Have Been Completed in Days or Weeks if SVTX Had Not Interfered** 16 **with Verio and NTTA’s Removal of the Equipment**

17 Although SVTX sued Verio and NTTA on the theory that the remediation extended  
18 beyond Verio and NTTA’s lease terms, SVTX alone made this inevitable. If SVTX had not  
19 reneged on its approval of Verio and NTTA’s decommissioning plan and prevented the removal  
20 of the equipment, the site would have been remediated in a matter of days. SVTX’s own  
21 environmental consultant, Benjamin Berman of E2C, Inc., testified that had the equipment been  
22 removed the site could have been remediated in a “matter of days or weeks.” Because  
23 decommissioning was set to begin on March 9, 2010, Mr. Berman’s testimony confirms that  
24 Verio and NTTA could have completed work long before the termination of their respective  
25 Lease Agreements if SVTX had not prevented them from doing so.

### 26 **B. SVTX Required Verio and NTTA to Go Above and Beyond Even its** 27 **Own Environmental Consultant’s Supplemental Work Plan**

28 Once remediation began, SVTX continued to cause delays. SVTX delayed completion of  
remediation by insisting that the soil be remediated to a level not required by any government or



1 regulatory agency. SVTX continued to add requirements to Verio and NTTA's remediation plan  
2 even after Mr. Berman counseled SVTX that there was preexisting contamination at 250 Stockton  
3 that had nothing to do with Verio or NTTA, and that regulatory agencies often permit  
4 contamination to remain at a site at levels significantly above the level SVTX was insisting upon.

5 **III. 250 STOCKTON WAS CONTAMINATED BEFORE VERIO AND NTTA**  
6 **LEASED THE PREMISES**

7 Although SVTX has not pled that the presence of contamination at 250 Stockton entitled  
8 it to damages, its pretrial statement suggests this is an argument SVTX may raise for the first time  
9 at trial. If SVTX attempts to argue that it is entitled to damages because contamination was  
10 present at 250 Stockton, the evidence will show that Verio and NTTA were not responsible for  
11 the contamination they remediated.

12 It is undisputed that 250 Stockton was contaminated when Verio and NTTA began their  
13 tenancies. Environmental records confirm that 250 Stockton was contaminated when Verio and  
14 NTTA began their tenancies, and Verio and NTTA's expert, Dr. Peter Krasnoff, will testify that  
15 the contamination Verio and NTTA remediated was not caused by Verio or NTTA.  
16 Dr. Krasnoff's testimony is based on environmental records from 250 Stockton that show the  
17 distribution of contamination could not have been caused by an aboveground fuel tank and  
18 generator system of the type maintained by Verio and NTTA. The depth and distribution of  
19 contamination confirms that preexisting contamination and other likely sources—including train  
20 tracks that are mere feet from the generator system—are much more likely sources.

21 SVTX has no answer to Dr. Krasnoff. The evidence will show that (a) Mr. Berman  
22 informed SVTX that contamination predated Verio and NTTA's tenancies, (b) the preexisting  
23 contamination was far more harmful than diesel, and (c) regulatory agencies routinely close sites  
24 with much higher concentrations of contamination than was present at 250 Stockton. In contrast,  
25 SVTX's environmental consultant, Mr. Berman will testify that he is not qualified to opine in this  
26 area and only drew an inference that it was possible that contamination from the diesel tank ended  
27 up in the soil. In fact at his deposition, Mr. Berman could not even say whether it was more  
28

likely than not that the contamination remediated was caused by Verio and NTTA, so SVTX cannot meet its burden of proof on this issue.

### LEGAL ISSUES

#### **I. VERIO AND NTTA DID NOT BREACH ANY LEASE TERM, AND SVTX HAS NOT SHOWN OTHERWISE**

Verio and NTTA did not breach any term of their respective Lease Agreements.

##### **A. No Provision of Verio and NTTA's Respective Lease Agreements Required Verio and NTTA to Comply with SVTX's Erratic Demands**

As described above, Verio and NTTA did not breach any of the provisions of their lease agreements. Verio and NTTA did not cause any contamination at 250 Stockton. But even if they did, SVTX is itself responsible for any delays associated with the remediation that Verio and NTTA voluntarily undertook. If SVTX had not prevented Verio and NTTA from removing the equipment from 250 Stockton in accordance with the plan it had previously approved, the remediation could have been completed before the end of the lease terms. SVTX then dragged the remediation out for months, insisting on remediating the soil to a level not required by any government agency on property that already contained contamination that was far worse. SVTX will not be able to show at trial that Verio or NTTA breached any provision of their respective Lease Agreements.

In addition, the Court has already adjudicated SVTX's theory of liability for holdover rent and, as detailed in Verio and NTTA's motion *in limine* No. 1, Verio has no viable claim for lost rent damages. Only SVTX's claim for reimbursement of environmental expenses, at most, remains for trial.

#### **II. SVTX CAN NEITHER RAISE NEW CLAIMS AND DAMAGES THEORIES FOR THE FIRST TIME AT TRIAL, NOR REVIVE CLAIMS THAT IT HAS ABANDONED**

The only claim that remains to be decided is SVTX's claim for reimbursement of environmental expenses. SVTX cannot argue claims that it did not plead in its complaint, or that it pled but subsequently abandoned. Along with any other claims or theories that SVTX did not

1 plead or disclose, SVTX should be precluded from arguing (a) that the presence of equipment at  
2 250 Stockton entitles it to damages, or (b) that it is entitled to lost rent.

3 **A. The Presence of Equipment at 250 Stockton Does Not Entitle SVTX to**  
4 **Damages**

5 As detailed in Verio and NTTA's concurrently filed motion *in limine* No. 1, documentary  
6 evidence, SVTX's discovery responses, and SVTX's deposition testimony unambiguously show  
7 that SVTX owns the equipment at 250 Stockton, and its presence at the site does not entitle  
8 SVTX to damages. Even if SVTX had pled in its complaint that the presence of the equipment  
9 entitles it to damages, this is no longer an issue for trial. As the Court confirmed in its May 28  
10 discovery order, SVTX admitted to owning the equipment at 250 Stockton. Under Federal Rule  
11 of Civil Procedure 36(a), SVTX's ownership of the equipment is conclusively established. Verio  
12 and NTTA will ask the Court to find that having insisted in March 2010 that the equipment could  
13 not be removed from the property, and causing Verio and NTTA to incur hundreds of thousands  
14 of dollars in additional remediation costs, SVTX is estopped from taking a different position now.  
15 Equitable estoppel is an issue for the Court to decide. *See Harara v. Conoco Phillips Co.*,  
16 No. C04-0515 BZ, 2005 U.S. Dist. LEXIS 1149, at \*6 fn. 3 (N.D. Cal. Jan. 27, 2005) citing  
17 *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, 30 Cal. App. 4th 54, 61  
18 (Cal. App. 2d Dist. 1994) (holding that the trial court erred by refusing to consider equitable  
19 estoppel claim in light of the jury verdict, noting that estoppel is a "nonjury fact question to be  
20 determined by the trial court").

21 **B. SVTX Has No Viable Claim for Lost Rent, and Abandoned that Claim**  
22 **in any Event**

23 As detailed in Verio and NTTA's concurrently filed motion *in limine* No. 1, SVTX has no  
24 viable claim for lost rent and abandoned that claim in any event. SVTX should not be permitted  
25 to revive its lost rent claim at trial. On summary adjudication, the Court rejected the only two  
26 grounds pled in SVTX's complaint on which a claim for lost rent could be based. Specifically,  
27 SVTX pled in its complaint that Verio and NTTA retained possession of 250 Stockton during  
28 remediation of land adjacent to the warehouse Verio and NTTA formerly leased from SVTX.

1 The Court rejected this theory, finding that Verio and NTTA did not retain possession of 250  
2 Stockton. SVTX also pled that Verio and NTTA's failure to obtain an environmental closure  
3 letter entitled it to damages. The Court found against SVTX on this issue as well, finding that  
4 there was no requirement under the lease or at law to obtain such a closure letter.

5 It is too late for SVTX to invent a new theory. Even if it could articulate a cognizable  
6 basis for claiming lost rent, SVTX's discovery responses show that it abandoned that claim and,  
7 as discussed below, that there is no evidence whatsoever of any disruption to its operations at  
8 250 Stockton.

### 9 **III. SVTX DID NOT SUFFER ANY DAMAGES AS A RESULT OF VERIO OR** 10 **NTTA'S ACTS OR OMISSIONS**

11 As explained above, SVTX cannot show that Verio or NTTA breached their respective  
12 leases. But even if they could show a breach, SVTX did not suffer any injury attributable to  
13 Verio or NTTA. To the contrary, Verio and NTTA paid for and executed a voluntary remediation  
14 at 250 Stockton for the benefit of SVTX after termination of their respective leases. The  
15 remediation was a windfall for SVTX.

#### 16 **A. SVTX Is Not Entitled to Damages for Lost Rent**

17 SVTX's admissions and discovery responses show that the remediation did not interfere  
18 with its operations at 250 Stockton, and that neither Verio nor NTTA caused SVTX to suffer any  
19 damages.

#### 20 **1. No Tenant Ever Refused to Lease 250 Stockton**

21 Even if SVTX could permissibly find some basis for reviving its claim for lost rent, no  
22 individual or entity ever refused to rent 250 Stockton for any reason attributable to Verio or  
23 NTTA. Instead, the one entity SVTX identified who even discussed leasing 250 Stockton  
24 declined to lease it because the facilities were inadequate. Moreover, the remediation did not in  
25 any way interfere with SVTX's operations at 250 Stockton. SVTX and several customers of  
26 SVTX's related entities continued to operate at 250 Stockton without interruption throughout the  
27 remediation. And SVTX's deposition testimony, as well as its various related entities' verified  
28 discovery responses, confirm that not one of the companies that operates at 250 Stockton created

1 a single document complaining about—or even referring to—the remediation, or the  
2 environmental condition at 250 Stockton.

3 **2. 250 Stockton Is Not Suitable for a Data Center**

4 Even if SVTX had made every effort to lease 250 Stockton (which it did not), it could not  
5 have overcome the fact that 250 Stockton is not suitable for a modern data center. And the  
6 evidence will show that 250 Stockton's inadequacy has nothing to do with environmental issues.  
7 Verio and NTTA's expert witness, Mr. Andrew Zighelboim, will testify that there are three  
8 independent reasons that 250 Stockton is not competitive in the market. First, the facilities at 250  
9 Stockton are outdated. Second, energy costs in San Jose are higher than nearby Santa Clara,  
10 where most new data centers in the area are located. Third, there are at least six other data centers  
11 in Santa Clara that are superior to 250 Stockton, and that do not have full occupancy. SVTX  
12 does not have any evidence to rebut Mr. Zighelboim's testimony.

13 **3. Even If SVTX Could Show that It Was Injured, It Did Not**  
14 **Attempt to Mitigate Damages**

15 SVTX failed to mitigate its damages because it did not attempt to lease 250 Stockton.  
16 Despite having months, if not years, to plan for Verio and NTTA's departure, SVTX chose not to  
17 seek tenants for 250 Stockton.

18 **B. Verio and NTTA Are Not Obligated to Pay SVTX's Environmental**  
19 **Expenses**

20 Although Verio and NTTA did not contaminate 250 Stockton, they did pay for its  
21 remediation. Not satisfied with this half-million dollar windfall, SVTX demands reimbursement  
22 for its own alleged environmental expenses. But SVTX is not entitled to any compensation from  
23 Verio or NTTA. Verio and NTTA did not cause any contamination at 250 Stockton, and are not  
24 obligated to pay SVTX for environmental expenses. SVTX has also never provided a  
25 computation of its alleged environmental expenses. There are no reliable records to document  
26 any of SVTX's claimed expenses.  
27  
28

SVTX's discovery responses suggest that its claim for environmental expenses includes attorneys' fees. But nothing in Verio or NTTA's respective Lease Agreements entitles SVTX to its claimed attorneys' fees.

### CONCLUSION

Between the Court's summary adjudication order, SVTX's failures of pleading and its discovery responses, the only claim left to try is SVTX's claim for reimbursement of environmental expenses. SVTX is not entitled to recover those expenses. Even if SVTX is permitted to argue other claims at trial, the evidence will show that Verio and NTTA were not responsible for any harm to SVTX. SVTX only has itself to blame for its failure to find a tenant for 250 Stockton.

Dated: August 27, 2013

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